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IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

M.P. No. 3451 of 1991.

PETITIONER : Shashibhushan son of Shri Vinayak Mahapatra, aged about 25 years, Occupation - Earstwhile, Tax Collector (Moharir), Resident of Dantewada, P.O. Dantewada, Tahsil Dantewada, District Bastar, M.P.

VERSUS

RESPONDENTS :

1. The State of Madhya Pradesh through Secretary, Housing and Envirement Department, BHOPAL.
2. ~~The Special Area Development Authority (S.A.D.A.), Beladila, H.O. Dantewada, District Bastar through The Chairman of the Said Authority (S.A.D.A.).~~
3. ~~The Chairman, Special Area Development Authority-Beladila H.O. Dantewada, Distt. BASTAR, MP.~~
4. ~~The Chief Executive Officer(Special Area Development Authority H.O. Dantewada, Distt. Bastar.~~

PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

ThePetitioner named above begs to submit as unde

1. That the petitioner is a citizen of India. He was appointed as Tax Collector (Moharir) on the pay scale of Rs. 775-12-955-14-1025-15-1100-20-1200 v order dated 25.1.90 on t robationof t the

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 3451 of 1991

Petitioner Shashibhushan

Versus

Respondents The State of Madhya Pradesh (now State of Chhattisgarh) and others

SB: Hon'ble Mr. Justice **Satish K. Agnihotri, J**

Shri Prafull Bharat, Advocate for the petitioner.

Shri V. V. S. Moorthy, Deputy Advocate General with Shri Arvind Dubey, Panel lawyer for the respondents No. 1 and 5.

None for the respondents No. 2 to 4, 6 and 7.

ORAL ORDER

(4th July, 2006)

The following order of the Court is passed by **Satish K. Agnihotri, J.**

1. This petition filed under Article 226/227 of the Constitution of India impugns the order 8.5.1991 (Annexure P/13), whereby the petitioner, who was working on the post of Moharrir, was removed from service on the ground of serious misconduct committed by the petitioner.

2. The facts of the case, in nutshell, are that the petitioner was appointed as Tax Collector (Moharrir) vide order dated 25.1.1990 (Annexure P/1) for a period of two years, on probation. According to the petitioner, the respondent No.3 – the then Chairman of Special Area Development Authority, Beladila, Dantewada visited the place of posting of the petitioner at barrier (naka), at that time, the petitioner was absent. The petitioner was accordingly issued a show cause notice dated 24.12.1990(Annexure P/2) to submit his explanation within a period of three weeks. The petitioner vide his representation dated 27.12.1990 (Annexure P/3) submitted his explanation stating

that due to his all of sudden indisposition, the petitioner had to leave the working place. It was further stated that the said conduct would not be repeated in future.

3. The then Chief Executive Officer of respondent No.3 issued a second show cause notice on 10.1.1991 (Annexure P/5) as to why the petitioner be not suspended from service. The petitioner further submitted his explanation vide representation dated 14.1.1991 (Annexure P/6) stating that the date of absence be treated as leave and the petitioner be pardoned for the said conduct. It was also stated that the petitioner had applied earlier for leave which was forwarded but could not be placed before the Chairman, Special Area Development Authority as such the absence was not wilful.

4. The petitioner was suspended from service vide order dated 17.1.1991 (Annexure P/7). According to the petitioner, the petitioner was not served with the charge-sheet despite his request letters dated 6.4.1991, 9.4.1991 and 14.5.1991 (Annexure P/8, P/9 and P/10, respectively). The respondents No. 2, 3 and 4 proceeded against the petitioner ex-parte and passed the impugned dismissal order dated 8.5.1991 (Annexure P/13) on the ground that on holding the departmental enquiry it has been found that the petitioner had committed grave misconduct with a purpose to cause loss to the department, as such in view of the fact that the petitioner was on probation, the service of the petitioner was dismissed.

5. Shri Prafull Bharat, learned counsel appearing for the petitioner submits that the service of the petitioner was dismissed on the ground of alleged misconduct for which it appears that the enquiry was conducted without affording any opportunity of hearing to the petitioner. Even the charge-sheet was not served on the petitioner despite his letters dated 6.4.1991, 9.4.1991 and 14.5.1991. Learned

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counsel further submits that this amounts to infraction of the provisions of Article 311(2) of the Constitution of India, hence the dismissal order be quashed being illegal, unconstitutional and contrary to the provisions of law as well as principles of natural justice.

6. In this petition,notices were issued to the respondents on 15.11.1991. Pursuant to the notice the respondents appeared and filed their reply. In the meantime on abolition of the Special Area Development Authority, an application for amendment (I.A.No. 4303/96) in the cause title was filed and the respondents were modified accordingly vide order dated 6.5.1996 and notice was issued to the newly impleaded respondents vide order date. 21.9.1996. The respondents No. 2 to 4 have filed their return on 19.10.1994. The respondents No. 2 to 4 remained throughout absent. The S.P.C. was issued on 28.6.2005 to the respondents No. 2, 3 and 4, which was served but no representation was filed on their behalf.

7. Shri V. V. S. Moorthy, learned Deputy Advocate General with Shri Arvind Dubey, learned Panel lawyer appearing for the respondents No. 1 and 5 while opposing the petition submits that in this petition, the main contesting party is the respondents No. 2 to 4.

8. I have gone through the return filed by the respondents No. 2 to 4. Firstly it is stated in the return that the petition be dismissed on the ground of availability of alternative remedy, and secondly the petitioner was served with the charge-sheet on 8.2.1991 which was refused by the petitioner. It is further stated in the return that the appointment of the petitioner was not as per Rules, as the post was not advertised and the candidates were not called from the employment exchange. The respondents have not submitted any response to the other points raised by the petitioner.

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9. Learned counsel for the petitioner relying on the submissions made in the rejoinder filed by the petitioner, submitted that the allegation that the petitioner has refused to accept the charge sheet is on the face of it, is incorrect. The petitioner has made representations which were never replied to and no charge-sheet was supplied to him. Learned counsel for the petitioner further submitted that it is incorrect that the petitioner's appointment was made without following the proper procedure of law. The petitioner was appointed following the due and proper procedure. The petitioner was interviewed by the authorities concerned and along with the petitioner two other persons namely Shri Domar Singh Sahu and Raj Narain Singh were also appointed and they are still working. It is further stated that no alternative remedy is available to the petitioner as the appeal under Rules 57 and 58 of the Madhya Pradesh Special Area Development Authority (Chairman and Officers and Servants Recruitment and Conditions of Service) Rules, 1976 (for short 'the Rules 1976') can be preferred only by regular employees, not the employees who are on probation.

10. Having considered the submission of learned counsel for the petitioner and learned counsel for the respondents No. 1 and 5 and having perused the return filed by the respondents, it is evident that the internal enquiry conduct to find out the alleged misconduct committed by the petitioner was ex parte. It is further clear that the petitioner was not served with the charge-sheet and further he was not afforded an opportunity of hearing enabling him for putting forward his case before the authorities. The impugned termination order was passed under the cloak of termination simpliciter. The impugned order is punitive in nature and the impugned order has been passed in violation of Article 311(2) of the Constitution of India

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and further violation of the principles of natural justice and fair play in action.

11. So far as the averments of the respondents No. 2 to 4 in the return with regard to the appointment of the petitioner is concerned, it is no one's case that the dismissal order was passed on the ground that the appointment of the petitioner was not in accordance with law and as such it is not necessary to go into the facts of the case so far as the appointment of the petitioner is concerned.

12. The Supreme Court in the case of **Anoop Jaiswal Vs. Government of India and another** { (1984) 2 SCC 369} has observed in para 12, as under:-

> "12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

13. The Supreme Court in the case of **Chandra Prakash Shahi Vs. State of U.P. and others** { (2000) 5 SCC 152} has observed in para 12, as under:-

> "12. Now, it is well settled that the temporary government servants or probationers are as much entitled to the protection of Article 311 (2) of the Constitution as the permanent employees despite the fact that temporary government servants have no right to hold the post and their services are liable to be terminated at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service. The courts can, therefore, lift the veil of an innocuously-worded order to look at the real face of the order and

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to find out whether it is an innocent as worded. (See: Parshotam Lal Dhingra v. Union of India.) It was explained in this decision that inefficiency, negligence or misconduct may have been the factors for inducing the Government to terminate the services of a temporary employee under the terms of the contract or under the statutory Service Rules regulating the terms and conditions of service which, to put it differently, may have been the motive for terminating the services but the motive by itself does not make the order punitive unless the order was "founded" on those factors or other disqualifications."

14. The Supreme Court in the case of **Pavanendra Narayan Verma Vs. Sanjay Gandhi PGI of Medical Sciences and another** { (2002) 1 Supreme Court Cases 520} has observed in para 21, as under:-

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

15. The Supreme Court in the case of **State of Punjab and others Vs. Sukhwinder Singh** { (2005) 5 SCC 569} has observed in para 19, as under:-

"19. It must be borne in mind that no employee whether a probationer or temporary will be discharged or reverted, arbitrarily, without any rhyme or reason. Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact-finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry is held behind his back, it is held that the order of discharge or termination from service is punitive in nature, even a bona fide

attempt by the superior officer to decide whether the employee concerned should be retained in service or not would run the risk of being dubbed as an order of punishment....."

16. The Supreme Court in the case of **State of Punjab and others Vs. Balbir Singh** {(2004) 11 SCC 743} has observed in para 7, as under:-

"7. Thus the principle that in order to determine whether the misconduct is motive or foundation of order of termination, the test to be applied is to ask the question as to what was the "object of the enquiry". If an enquiry or an assessment is done with the object of finding out any misconduct on the part of the employee and for that reason his services are terminated, then it would be punitive in nature. On the other hand, if such an enquiry or an assessment is aimed at determining the suitability of an employee for a particular job, such termination would be termination simpliciter and not punitive in nature. This principle was laid down by Shah, J. (as he then was) as early as 1961 in the case of State of Orissa v. Ram Narayan Das[7]. It was held that one should look into "object or purpose of the enquiry" and not merely hold the termination to be punitive merely because of an antecedent enquiry. Whether it (order of termination) amounts to an order of dismissal depends upon the nature of the enquiry, if any, the proceedings taken therein and the substance of the final order passed on such enquiry....."

17. With regard to the availability of the alternative remedy, on reading of the provisions of Sections 57 and 58 of the Rules, 1976, it appears that no alternative remedy is available. However, in the facts and circumstances of the case it would not sub-serve the interest of justice if the petitioner is driven at this stage after a period of 15 years to avail the alternative remedy.

18. For the reasons and analysis hereinabove, the impugned order dated 8.5.1991 (Annexure P/13) deserves to be quashed. On the question of grant of back wages, no foundation has been laid with regard to the gainful employment of the petitioner. The time gap between the dismissal order and passing of this order when the matter was

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pending for a period of about 15 years in the Court and looking to the financial condition of the concerned respondents, it would not be fair to grant full back wages. This Court is of the opinion that grant of 30% back wages would be sufficient in the interest of justice.

19. For the reasons stated above and the dicta laid down by the Supreme Court in various cases, cited above, this petition is allowed. The respondents are directed to reinstate the petitioner in service with 30% back wages. The petitioner would be entitled to all consequential benefits like seniority etc. on notional basis. In the facts and circumstances of the case there shall be no order as to costs.

Sd/-
Satish K. Agnihotri
Judge

Thakur